Supreme Court, U.S.
FILED
MAY 28 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1629

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

INTERNATIONAL MOLDERS and ALLIED WORKERS UNION, AFL-CIO-CLC, AND LOCAL 100 OF THE INTERNATIONAL MOLDERS AND ALLIED WORKERS UNION, AFL-CIO-CLC,

Petitioners,

v.

JAMES HOWARD and ROBERT BATES, individually and on behalf of all others similarly situated, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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REPLY BRIEF

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TABLE OF AUTHORITIES

Cases: Page

Griggs v. Duke Power Co., 401 U.S. 424 (1971) 4

Terrell v. United States Pipe & Foundry Co., 644 F.2d 1112 (5th Cir. 1981) 1, 2, 6

Williams v. General Foods Corp., 492 F.2d 399 (1974) 5

Statutes:

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* ..... *passim*

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1. Respondents contend that "[t]he decisions below do not . . . announce or apply any rule imposing vicarious liability on an innocent union that merely fails to prevent employer discrimination." Resp. Br. at 8. Rather, respondents contend, "the actual legal principle . . . applied in this case [is] that a union involved in unlawful discrimination must take affirmative steps to bring that discrimination to an end." *Id.* at 10. That contention simply misstates the holding of the lower courts.

It is, of course, true as respondents note that the district court and court of appeals relied on the Fifth Circuit's decision in *Terrell v. United States Pipe & Foundry*

Co., 644 F.2d 1112 (5th Cir. 1981),[1] and that *Terrell* did impose a duty to "take[] every reasonable step to bring employment practices into compliance with the law" on a union which had agreed to an unlawful seniority system and thus was "involved in an established Title VII violation." *Id.* at 1120. But what respondents ignore is that in the instant case the courts below expressly *extended Terrell*'s rationale by holding that the duty to "take every reasonable step" is *not* limited to a union which is "involved in" a discriminatory practice but rather applies to *any* union which represents workers in a workplace where the employer is in violation of Title VII.

The opinion of the courts below could not be clearer in this regard. The district court stated that the respondents had to prove only two elements in order to prevail on their claim that the union unlawfully "acquiesced" in the company's use of the test:

> To prevail on this claim, plaintiffs must establish first that the mechanical comprehension test used by the company violated Title VII, and second, that defendants failed to comply with the *Terrell* "every reasonable step" standard. [Pet. App. 56a-57a].

And the district court announced that it "found the defendant unions liable under Title VII for failing to take every reasonable step *to insure that the employer complie*[*d*] *with Title VII. . . .*" (Pet. App. 76a, emphasis added).

The court of appeals affirmed on exactly the same basis. That court stated:

> Once the trial court found that the mechanical aptitude test had, during its entire period of operation, had a disparate impact on the minority class, it follows that it was the duty of the defendant unions under the *Terrell* standard to make every reason-

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[1] A portion of the judgment in *Terrell* was vacated, at 456 U.S. 955 (1982), on the petition of a party that was not subject to the holding described in the text.

> able effort to see that these tests were brought to an end. [Pet. App. 13a]

The opinions below thus leave no room for doubt as to their holding. Both the district court and the court of appeals squarely held that when an employer's practice violates Title VII, the union has a duty to take every reasonable step to bring about an end to that practice.

Indeed, had the courts below believed that the duty to prevent employer discrimination is triggered only if the union is "involved in" that discrimination, there would have been no basis for holding the union liable here, for the district court made no predicate finding of union involvement. The district court did not find that the union played any role in the company's decision to start using the test.[2] Nor did the district court find that the union thereafter agreed to the company's use of the test or in any other way took part in, or urged, encouraged, or approved its use. Indeed, the district court found that on two occasions the union protested the use of the test.[3] Furthermore, the district court found that the union had actively negotiated for contract changes that "enabled blacks to escape the dead end jobs" (Pet. App. 54a) and that "benefited black employees and served to advance

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[2] For example, in describing the decision to begin using the tests, the district court found:

> After July 2, 1965, the company started using testing of employees prior to entry to jobs and departments. The union defendants *did not opose this.* [Pet. App. 37a; emphasis added. *See also* Pet. App. 44a, 47a.]

[3] Respondents erroneously claim (Resp. Br. at 16 n.7) that the first of the two protests involved the filing of a grievance which ultimately was dropped. *See* n.4 *infra.* Respondents are mistaken: the first protest to which we refer was made by an authorized union representative in January 1970; it was not the August 1970 grievance. *See* Pet. App. 43a.

employment opportunities for black employees at Clow" (*id.* 42a). *See also* Pet. App. 43a-44a, 46a, 76a n.1. The *only* respect in which the district court faulted the union's conduct during the limitations period was for failing to take certain steps to oppose the company's use of the test.[4]

Respondents attempt to overcome the absence of findings of union involvement in the employer's testing by maintaining that the union "knowingly acquiesced in the

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[4] *See, e.g.*, Pet. App. 35a, 43a-44a, 46a-47a, 58a. Each of the incidents of supposed union discrimination that respondents cite occurred prior to the limitations period and, in most instances, years before the enactment of Title VII. *Compare* Resp. Br. at 3, 14-15 *with* Pet. App. 24a, 27a-30a (dating incidents involving union as occurring in 1937 and 1958).

Respondents place special weight on a company-union meeting that occurred in August 1970—almost five years before the limitations period began—suggesting that the district court's findings regarding this meeting establish "at least a tacit agreement [by the union] that the test would continue." Resp. Br. at 16. But all that the district court found was that at the meeting in question the union agreed that the grievance procedure did not cover a grievance alleging that the test violated the "civil rights" of two black grievants; the district court did not find any other agreement by the union. Pet. App. 34a.

The district court did suggest that the grievance should have been covered because the collective bargaining agreement contained "an anti-discrimination clause." (*Id.*) Respondents take that suggestion one step further and argue that if the union had prosecuted the grievance an arbitrator would have ended the use of the test. (Resp. Br. at 15-16). But the district court did not so find, and respondents' argument is based on a facile assumption that a labor arbitrator in 1970 would have held that a contract clause prohibiting discrimination reached not only discrimination on the basis of race but also practices having a racially disparate impact—a theory that was not even established under Title VII until the following year. *See Griggs v. Duke Power Co.*, 401 U.S. 424, 428 (1971) (the "disparate impact" issue was a "question of first impression" under Title VII). In all events, the district court's finding that the union failed to pursue this grievance in these circumstances cannot be equated with a finding of any kind of "tacit agreement" that the test would continue to be used.

use of the discriminatory test." Resp. Br. at 13. In so arguing respondents come full circle. For if, as respondents maintain, a union commits a wrong by "knowingly acquiesc[ing]" in an employer's discriminatory acts, it necessarily follows that to avoid liability a union has an affirmative duty to endeavor to prevent any act of employer discrimination of which the union is aware. Thus respondents' legal theory ultimately confirms what in any event is self-evident from the opinions below: the lower courts here held that every union—and not just a union involved in a discriminatory act—has a legal duty to prevent any act of employer discrimination of which the union is aware. This case therefore plainly raises the important legal question presented in our petition.

2. Respondents deny that the decision below conflicts with the Seventh Circuit's decision in *Williams v. General Foods Corp.*, 492 F.2d 399, 405 (1974). *See* Resp. Br. at 11-12. According to respondents, the court in *Williams* dismissed the claim against the union on the ground that the unions "had not 'acquiesced' in or agreed to the disputed practices" as "the union had aggressively pursued a grievance challenging the unlawful practice." Resp. Br. at 12. But the Seventh Circuit's opinion in *Williams* says nothing of the kind; what it says is that there is no union liability for "[m]ere failure by the unions to protect female employees from discriminatory Corporation policies." 492 F.2d at 405. Thus, contrary to respondents' argument, *Williams* holds that unions cannot be held liable merely for "acquiescing in" unlawful employer practices. *Williams* is therefore in square conflict with the decision below.[5]

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[5] The basis on which respondents attempt to distinguish *Williams*, as discussed in text, provides still further confirmation that, even in respondents' view, the decision below in the instant case holds the union liable for mere "acquiescence," which is to say for failure to act to prevent the employer from discriminating. Indeed according to respondents the union in *Williams* would have been liable for the employer's discrimination had the union not "aggressively pursued a grievance."

3. Finally, respondents suggest that the union here "expressly endorsed" the rule of law applied by the courts below. Resp. Br. at 11. Once again respondents are mistaken.

What the union "endorsed" in the lower courts was the rule that was applied by the Fifth Circuit in *Terrell*: a union which, in collective bargaining, agrees to an unlawful contractual provision must, to avoid liability for its wrong, make every reasonable step to stop the discrimination. The union's briefs below carefully distinguished such a case from one in which the employment practice at issue was unilaterally adopted by the employer, arguing that in this latter situation section 703 (c) (3) cannot be violated unless there is "some action, some urging, some participation in the result by the union." Petition for Rehearing, at 2. The union explained:

> While the Molders accept the "*Terrell* test" with respect to those employment practices as to which the Union actively participates in creating, such as seniority systems, and the impact of which is overt and apparent, *we cannot accept the logic or fairness of applying the same test to a practice which the Union emphatically and undeniably did not promote.* [*Id.* at 3 (emphasis added)] [6]

The union made the same point in its brief to the panel. *See* Union's Br. in C.A. No. 85-7008 at 48-49; Union's Reply Br. in C.A. No. 85-7008 at 8.

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[6] Respondents conveniently quote only the first half of this passage, omitting the underscored portion. Resp. Br. at 9 n.3. Respondents likewise mischaracterize the position taken in the Union's Reply Br. below at 8 where we argued:

> There is no case holding a union liable for an employers [*sic*] employment practices to which the union does not explicitly agree, typically by agreeing to incorporate the illegal provisions in a collective bargaining agreement. The "all reasonable means" test of such cases as *Terrell v. U.S. Pipe*, 644 F.2d 1112 (5th Cir. 1981), are all seniority system cases in which the system was held to be non-bona fide and to which the union has assented by means of a contract. . . . Because a union

Thus, the position we urge here was expressly advanced below. Equally clearly, that position was rejected by the lower courts. And for the reasons set forth in our petition—reasons which respondents essentially ignore—the holding below that unions are required to "take every reasonable step" to prevent employer discrimination merits plenary review by this Court.

CONCLUSION

For the foregoing reasons, and the reasons stated in the petition, the petition should be granted and a writ of certiorari should issue to review the decision of the court of appeals in this case.

Respectfully submitted,

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participated in creating a seniority system which discriminates, it has an obligation to remove the effects of the system they made in part. *But in the absence of participation or agreement, a union should not have to pay damages.* [Emphasis added]

Finally, respondents attribute to the union the statement that "a union need not successfully end a discriminatory practice to avoid liability—it need only oppose the practice." Resp. Br. at 9 n.3. That statement was made by the union as part of an alternative argument that even if Title VII required a union to combat discrimination by employers, that duty would be satisfied if the union "oppos[ed] the practice" and would not require the union to take "every reasonable step" in opposition. Union's Br. in C.A. No. 85-7008 at 50-51. *See* Pet. at 12-13 n.11.